IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 48 of 2007

Date of decision: 14.09.2007

Commissioner of Central Excise Commissionererate
Ludhiana

.....Appellant

Versus

M/s Dr. Lal Path Lab (P) Ltd., Collection Centre, Ludhiana

.....Respondent

Coram: Hon'ble Mr. Justice M.M.Kumar
Hon'ble Mr. Justice Ajay Kumar Mittal

Present: Mr. Kamal Sehgal, Advocate,
for the appellant.

M.M.Kumar, J.

This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 challenges order dated 30.08.2006 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (P-3) by holding that the services rendered by the assessee-respondent do not fall in any of the category specified in the definition of 'Business Auxiliary Service' as per sub Section 19 of Section 65 of the Finance Act, 1994. The argument raised by the revenue is that the activity carried out by the assessee-respondent amounted to promotion or marketing of service provided by its principal M/s Dr. Lal Path Lab, New Delhi has been rejected by the Tribunal. The revenue has claimed that the following substantial question of law would arise for the determination of this Court:-

> " Whether the Hon'ble Tribunal is correct in holding that the services rendered by the respondents do not fall under any category specified in the definition of 'Business Auxiliary Service' and is within the scope of "Technical Test and Analysis Services" and whether service tax is payable on such services."

Facts in brief are that there is a lab known as M/s Dr. Lal Path Lab (P) Ltd., Collection Centre at Ludhiana, which is engaged in the collection of blood, urine and stool samples on behalf of its Principal M/s Dr. Lal Path Lab (P) Ltd. , New Delhi for conducting biological tests. The assessee-respondent based at Ludhiana are given 25% of commission. Sh. Vaneet Grover, proprietor of Cenre at Ludhiana, in his statement dated 26.05.2004 recorded by the Superintendent (Anti-Evasion) at the time of investigation has stated that he is the sole proprietor of the assessee-firm, which is Franchisee of the company based at Delhi in pursuance of an agreement between them. According to the statement made, the samples so drawn are collected by the collection centre and then sent by them to the company at New Delhi through a courier. Out of the total collection, 75% of amount was transferred to the principal lab at Delhi by the assessee-respondent through demand drafts.

On the basis of the preliminary investigation held, another show cause notice dated 06.10.2004 was issued to the assessee-respondent as to why service tax amounting to Rs. 49,251/- involved in taxable value amounting to Rs. 6,15,631/- should not be demanded from them under Section 73 (b) of the Finance Act, 1994. The show cause notice also contemplated as to why penalty should not be imposed upon them under Sections 75-A, 76 and 77 of the Act for failure to get itself registered and for non-payment of service tax and also for not filing ST-3 Return. The show cause notice was contested and after detailed discussion, the Assistant Commissioner Central Excise, Division-III, Ludhiana passed an order on 30.11.2004 confirming the demand of service tax by placing reliance on Section 73 (a) by invoking the extended period of 5 years. He also raised demand of interest from the assessee-respondent under Section 75 of the Act and imposed penalty equal to the amount of tax payable under Section 76. Therefore, penalty of Rs. 1,000/- for

contravening provision of Section 75-A of the Act to get itself registered with the Central Excise Department under Section 77 of Central Excise Act, was imposed.

On appeal before the Commissioner, the demand of tax was upheld being covered by Section 65 (19) (ii) of the Act. However, the interest demanded was upheld as the payment of service tax was delayed. However, he deleted the penalties imposed under Sections 76 and 75 A of the Act, holding that the element of mens rea was totally missing.

On further appeal filed by the assessee-respondent, the Tribunal came to the conclusion that the activities of the assessee-respondent were not covered by the provisions of Section 65 (19) (ii) of the Act. The view of the Tribunal is discernible from paras 11 to 14 of its order, which reads as under:-

> "11. There is no dispute that testing and analysis carried out in the specialized laboratories constitute "technical testing and analysis service" contemplated under the law. Those laboratories are also not subjected to, including in relation to the drawing of blood samples, service tax, treating those tests and analysis as relating to human beings. The services rendered by the appellants drawing, processing and forwarding of samples is integral to the testing of those samples. As already noted, one of the impugned orders has also noted that the drawing of test samples may form part of test and analysis. All the same, they are being subjected to tax on the plea that those services are separate from the scope of testing and analysis service and are taxable as business auxiliary service. This approach is hard to understand. There could be no denying that in the absence of drawing of blood samples, there

can be no testing. Further, even if the two services are seen as entirely separate and different services, drawing of sample and initial processing of the same are clearly, connected or incidental or ancillary to testing and analysis. We have already reproduced the definition of technical testing and analysis service in para 4 of this order. That definition is very broad in its scope. It covers “any service in relation to testing and analysis service”. Thus, drawing of sample will come within the scope of the definition. The dispute as to whether drawing of sample forms part of testing and analysis service is not relevant in view of the sweeping nature of the definition. If the service is `in relation to' testing the service will get classified under technical testing and analysis. It is inconceivable that `relationship' of sample drawing and initial processing to testing can be denied. The relationship may be incidental or auxiliary. Whichever way it is, its connection to testing and analysis service is clear, integral and undeniable. Thus, in the factual situation of the case, and the broad scope of the definition, definitely bring the services renders by the collection centres within the scope of technical testing and analysis service.

12. It is well settled that once there is a specific entry for an item in the tax code, the same cannot be taken out of that specific entry and taxed under any other entry. In the present case, revenue is seeking to discard the specific entry and to bring the appellants' services under a very general entry, only because under the specific entry no tax is payable. This approach is contrary to the scheme of the legislation. What is specifically kept out of a levy by the legislature cannot be

subjected to tax by the revenue administration under another entry.

13. There is also no substance in the learned SDR's contention that since through definition, testing in relation to human beings or animal is excluded from the levy, those tests and analysis are liable to be taxed under some other general heading. Legislature has specifically recognized technical testing and analysis as a separate service for the purpose of levy. As to how the technical test and analysis are to be taxed under that heading is also for the legislature to decide. In the present case, through definiton, the legislature has excluded “testing or analysis of human beings or animal” outside the levy. The definition clearly states the legislative intention not to impose any tax on such excluded technical testing and analysis. If the legislature had any intention to tax the testing or analysis in relation to human being or animal at a different rate than other technical test and analysis service, the legislature would have separately specified the levy. In the present case, clearly he intention of the legislature is not to impose any levy at all on testing or analysis of human beings or animals. Therefore, the contention of the learned SDR to the contrary is not a legally correct view.

14. The services rendered by the appellants herein also do not seem to fall under any category specified in the definition of 'business auxiliary service'. The agreements make it clear that the appellants are not engaged for promotion or marketing of testing and analysis service. The appellants' business is organized for drawal of samples and for processing and forwarding of those samples. They are

> also not in the business of marketing or business promotion. The expertise, through technical staff (Phlebotomist) is for rendering service in connection with human blood testing. Similarly, equipment available are for drawing, processing and preserving of samples. Thus, clearly, the appellant cannot come under serial No. (ii) of business auxiliary service. Serial No. (iv) brings "any incidental or auxiliary support service" within the scope of business auxiliary service. Type of services covered therein are illustrated in the definition "billing", collection or recovery of cheques, accounts and remittance" etc. The drawing of sample and processing and forwarding of such samples are not in the same genre as any of the illustrative services mentioned under serial No. (iv). Serial No. (iv) makes it clear that only incidental or auxiliary support services such as the ones mentioned therein would fall within the definition. As already noted, the services provided by the appellants do not come within the categories of services mentioned in the definition, therefore, these services cannot fall within serial No. (iv)."

Learned counsel for the revenue has argued that there is element of promotion or marketing provided by the assessee-respondent to the principal client and, therefore, the activities of the assessee-respondent are covered by Section 65 (19) (ii) of the Act. According to the learned counsel, by virtue of the activity of the assessee-respondent drawing samples of blood, urine and stool etc., they end up advertising and advancing the business interest of its principal and, therefore, the aforementioned activity should be sufficient to bring the assessee-respondent within the definition of 'Business Auxiliary Service'.

Having heard the learned counsel and closely perusing the

order passed by the Tribunal, we are of the considered view that this appeal is liable to be dismissed because in pith and substance, the activity of the assessee-respondent is confined to a collection centre with facilities and trained employees for drawal of blood samples and to carry out essential processing (serum separation) of blood and forwarding the samples to the principal lab at Delhi through courier. The collection centres are also responsible for disposal of waste arising in the process. The case of the assessee-respondent appears to be covered by the exception postulated by sub Section 106 of Section 65, which defines the expression 'technical testing and analysis'. The provision is reproduced hereunder for facility of reference:-

> " "technical testing and analysis" means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or any immovable property, but does not include any testing or analysis service provided in relation to human beings or animals;
>
> [Explanation: For the removal of doubts, it is hereby declared that for the purposes of this clause, "technical testing and analysis" includes testing and analysis undertaken for the purpose of clinical testing of drugs and formulations; but does not include testing or analysis for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals;] "

A perusal of the aforementioned provision makes it clear that the expression 'technical testing and analysis' does not include any testing or analysis service provided in relation to human being or animals. The

explanation goes to the extent of excluding from the aforementioned definition, a testing or analysis for the purposes of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals. Such being the statutory provision, we do not entertain any doubt that merely because any incidental service is rendered by the assessee-respondent like putting across or dropping of the name of the principal company, it would become part of the definition of 'Business Auxiliary Service' within the meaning of Section 65 (19) (ii) of the Act. The view taken by the Tribunal is unassailable and deserves to be upheld.

For the reasons aforementioned, this appeal fails and the same is dismissed.

(M.M.KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

September 14, 2007
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